Vistanet (M) Sdn Bhd v Pilecon Civil Works Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–186 OF 2005
ABDUL MALIK ISHAK J
27 JULY 2005

Civil Procedure — Injunction — Mandatory and prohibitory injunction — Injunction against defendant to vacate and return possession of site to plaintiff — Whether contract under Pertubuhan Aktiek Malaysia applied — Whether breach of contract — Whether termination of defendant's employment lawful — Whether to grant injunctions — Balance of convenience

The plaintiff was appointed by the proprietor and developer, Mayland Boulevard Sdn Bhd as the main contractor for the construction of a project of service apartments ('the project'). By an agreement via a letter of acceptance ('the letter of acceptance') the plaintiff had appointed the defendant to construct and complete the project. The defendant delayed and suspended work with no credible assurance as to when the defendant would complete the project. By this, the plaintiff claimed that the defendant had breached cl 25.1(i) of the Pertubuhan Akitek Malaysia ('PAM') contract and had determined the defendant's employment to seek another contractor to complete the remaining works.

The defendant then removed those properties belonging to them at site and disputed as to whether the plaintiff was entitled to terminate the letter of acceptance and whether the PAM contract was applicable.

The plaintiff sought for, *inter alia*: (a) a mandatory injunction that the defendant give possession of the site to the plaintiff; (b) a mandatory injunction that the defendant leave the site immediately; (c) a prohibitory injunction that the defendant be prevented from entering the site; (d) a mandatory injunction that the defendant returned all properties unlawfully removed from the site to the plaintiff.

Held, allowing the application:

(1) Although the PAM contract was pending execution the defendant and the plaintiff had expressly and impliedly agreed to the terms contained therein in order to carry out their contractual obligations (see para 7). The defendant had impliedly accepted the determination by removing those properties belonging to them at the site, so it was correct to say that the termination was lawful (see paras 25 and 27).

(2) The defendant had clearly made its intention known that it would not proceed further with the project. The defendant had, in fact, legally abandoned the site. In a construction contract, the plaintiff need not wait for the completion period to expire because it would be too late for the work to be completed within a given time schedule. The defendant

was more interested in being paid and indeed the defendant's claim was entirely monetary. (see para 30).

(3) The balance of convenience in this case favoured the granting of the injunctions in favour of the plaintiff. The consequences for not granting the injunctions would be as follows, *inter alia*: (1) the plaintiff would be liable to pay millions of ringgit in LAD to the proprietor who in turn would have to pay the purchasers millions of ringgit in LAD; (2) the purchasers might rescind the sale and purchase agreements and may even demand the refund of the deposits and whatever monies that had been paid and failing which the plaintiff may be wound up for its inability to pay; (3) the defendant had expressly and impliedly accepted the determination of their employment by their conduct of removing their goods and materials from the site; (4) the defendant's continued occupation of the site had harmed and would cause irreparable harm if the defendant was allowed to occupy the site without carrying out any work; it would be reasonable to return possession of the site to the plaintiff who could immediately employ another contractor to carry out and complete the unfinished works (see para 57).

(4) The defendant had breached cl 25.1(i) of the PAM contract by stopping work, delayed the completion of the project and failed to adhere to the work programme. All these motivated the plaintiff to determine the defendant's employment. If the defendant was allowed to remain in possession of the site as they wanted this court to allow them to do so, it would result in a stalemate and finally an ultimate abandonment of the project (see para 59).

[**Bahasa Malaysia summary**

Plaintif dilantik oleh pemilik dan pemaju, Mayland Boulevard Sdn Bhd sebagai kontraktor utama bagi satu projek pembinaan servis apartment ('projek itu'). Melalui satu perjanjian dan sepucuk surat penerimaan ('surat penerimaan itu') plaintif telah melantik defendan untuk membina dan menyiapkan projek itu. Defendan telah menangguhkan dan berhenti kerja tanpa sebarang jaminan bila defendan akan menyiapkan projek itu. Dengan ini, plaintif menuntut bahawa defendan telah memungkiri klausa 25.1(i) kontrak Pertubuhan Akitek Malaysia ('PAM') dan telah memberhentikan pekerjaan defendan untuk melantik kontraktor yang lain bagi menyiapkan kerja-kerja pembinaan.

Defendan kemudiannya mengeluarkan segala harta kepunyaan mereka di tapak pembinaan dan menuntut sama ada plaintif mempunyai hak untuk menamatkan surat penerimaan itu dan sama ada kontrak PAM boleh digunapakai.

Plaintif menuntut, *inter alia* untuk: (a) satu injunksi mandatori bahawa defendan memberi hak milik tapak pembinaan kepada plaintif; (b) satu injunksi mandatori

bahawa defendan meninggalkan tapak pembinaan dengan segera; (c) satu injunksi prohibitori bahawa defendan dihalang daripada memasuki tapak pembinaan dan (d) satu injunksi mandatori bahawa defendan memulangkan semua harta yang diambil secara tidak sah daripada tapak pembinaan kepada plaintif.

Diputuskan:

(1) Walaupun kontrak PAM sedang menunggu pelaksanaan, defendan dan plaintif telah secara nyata dan tersirat bersetuju kepada terma-terma yang terkandung dalam kontrak itu untuk menjalankan obligasi kontratual mereka (lihat perenggan 7). Defendan telah secara tersirat menerima penamatan itu dengan mengeluarkan harta kepunyaannya dari tapak pembinaan itu, oleh itu, adalah betul untuk mengatakan bahawa penamatan itu adalah sah (lihat perenggan 25 dan 27).

(2) Defendan telah jelas menyatakan tujuannya untuk tidak meneruskan kerja-kerja projek itu. Dalam satu kontrak pembinaan, plaintif tidak perlu menunggu tempoh untuk menyiapkan projek itu matang kerana ini akan menyebabkan kerja itu tidak dapat di siapkan dalam masa yang ditetapkan. Defendan lebih berminat untuk dibayar dan sememangnya tuntutan defendan kesemuanya untuk duit (lihat perenggan 30).

(3) Imbangan kemudahan dalam kes ini menyebelahi pemberian injunksi kepada plaintif. Akibat daripada tidak memberikan injunksi adalah seperti berikut, *inter alia*: (1) plaintif akan bertanggungjawab untuk membayar berjuta-juta ringgit dalam LAD kepada pemilik yang kemudiannya perlu membayar kepada pembeli berjuta-juta ringgit dalam LAD; (2) pembeli mungkin membatalkan perjanjian jual beli malah mungkin juga menuntut bayaran balik deposit dan apa-apa sahaja bayaran yang telah dibuat yang mana plaintif mungkin akan diambil tindakan penggulungan sekiranya gagal membayarnya; (3) defendan secara jelas dan juga tersirat menerima penamatan pekerjaan mereka secara perbuatan mengalih barangan mereka daripada tapak binaan; (4) defendan menyambung untuk menduduki tapak berkenaan telah mengakibatkan keburukan dan akan menyebabkan keburukan yang tidak boeh diperbaiki lagi sekiranya defendan dibenarkan untuk menduduki tapak berkenaan tanpa membuat sebarang pekerjaan; ianya adalah munasabah untuk memulangkan milikan tapak berkenaan kepada plaintif yang boleh mengupah kontraktor lain dengan segera untuk menjalankan dan menyiapkan kerja-kerja yang terbengkalai (lihat perenggan 57).

(4) Defendant telah memungkiri klausa 25.1(i) kontrak PAM dengan berhenti berkerja, melewatkan masa penyiapan projek itu dan gagal mengikut program kerja. Semua ini menggalakkan plaintif untuk menghentikan pekerjaan defendan. Sekiranya defendan dibenarkan untuk terus memiliki tapak tersebut seperti yang mereka kehendaki mahkamah benarkan, ianya

akan mengakibatkan kebuntuan dan akhirnya menyebabkan terbengkalainya projek tersebut (lihat perenggan 59).]

Notes

For cases on mandatory and prohibitory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3062–3063.

Cases referred to

Alexander Brogden & Ors v The Directors, & c, of the Metropolitan Railway Co [1877] 2 AC 666 (refd)
Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)
American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (refd)
Bonner v Great Western Railway Co (1883) 24 Ch D 1 (refd)
Cayne & Anor v Global Natural Resources plc [1984] 1 All ER 225 (refd)
ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd [1991] 3 MLJ 269 (refd)
Luganda v Service Hotels Ltd [1969] 2 Ch 209 (refd)
MBf Property Services Sdn Bhd v Madihill Development Sdn Bhd (No 2) [1998] 4 CLJ 136 (refd)
Nottingham Building Society v Eurodynamics Systems Plc & Ors [1993] FSR 20 (refd)
Oh Kuang Liang v Associated Wood Industries Sdn Bhd [1995] 4 MLJ 390 (refd)
Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd [2002] 5 CLJ 391 (refd)
Shepherd Homes Ltd v Sandham [1970] 3 All ER 402 (refd)
Thomas M Heysek v Boyden World Corp [1989] 1 MLJ 219 (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192 (refd)

Joseph Iruthayam (Joseph Iruthayam & Co) for the plaintiff
Shanti Mogan (SY Liew with her) (Shearn Delamore & Co) for the defendant

Abdul Malik Ishak J:

ENCLOSURE 4

[1] By this enclosure, the plaintiff sought for the following prayers:

(a) a mandatory injunction that the defendant, their servants, their agents or anyone acting under their instructions give possession of the site to the plaintiff immediately after the service of the injunction order on them (the details of the site will be explained hereinafter);

(b) a mandatory injunction that the defendant's servants, agents or anyone acting under them to leave the site immediately

upon service of the injunction order on them (the details of the site will be explained hereinafter);

(c) a prohibitory injunction that the defendant, his servants, agents or representatives be prevented from entering the site (the details of the site will be explained hereinafter);

(d) an injunction that the defendant, his agents, representatives or their servants be prevented from removing all properties from the site (the details of the site will be explained hereinafter);

(e) a mandatory injunction that the defendant return all properties unlawfully removed from the site to the plaintiff (the details of the site will be explained hereinafter);

(f) costs of the application to be borne by the defendant; and

(g) any other relief which this honourable court deems fit and reasonable.

[2] In the midst of submission, the learned counsel for the plaintiff withdrew prayer (e) of encl 4 and I accordingly struck it out without costs.

[3] Now, the site is at Lot 23, Seksyen 40, Jalan Munshi Abdullah, Kuala Lumpur and from my chambers at civil court 6, 11th Floor, Wisma Denmark, Jalan Ampang, the site can be seen unobstructed — it is abandoned, derelict and forlorn. Of course, the learned counsel for the defendant pointed out the location of the site from my chambers. The site is a development project known as the 'Tower' and it is another service apartment sprouting in the heart of Kuala Lumpur city.

[4] In this judgment, I vigorously applied the principles of law enunciated by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, and this was what his Lordship said at pp 206 to 207:

> To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. Heis entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

THE FACTS, THE LAW AND THE ANALYSIS THERETO

[5] The plaintiff was appointed by the proprietor and developer by the name of Mayland Boulevard Sdn Bhd (hereinafter referred to as the 'proprietor') as the main contractor for the construction of the project known as 'Cadangan Satu Blok 33 Paras Servis Apartment Yang Mengandungi 20 Paras Servis Apartment (511 unit service apartment suite, satu paras Podium (12 unit apartment suite dengan kolam renang dan kemudahan), satu paras Mezzanine (14 unit apartment suite, satu paras ruang legar, tiga paras pejabat dan tujuh

paras tempat letak kereta di atas Lot 23, Seksyen 40, Jalan Munshi Abdullah, Kuala Lumpur (hereinafter referred to as the 'said works')'.

[6] By an agreement dated 16 October 2003 (hereinafter referred to as the 'letter of acceptance'), the plaintiff had appointed the defendant to construct and complete the said works for the contract sum of RM34,130,498.85 and a further sum of RM800,000 for contingencies. It was agreed that the defendant shall commence the said works on 13 August 2003 and shall complete the same on or before 12 May 2005. There were, unfortunately, delays in the completion of the said works and the plaintiff granted an extension of the completion to 10 July 2005.

[7] It was the stand of the plaintiff that the contract between the parties was governed by the Pertubuhan Akitek Malaysia (PAM) contract. The defendant submitted that it was not so. Now, although the PAM contract was pending execution the defendant and the plaintiff had expressly and impliedly agreed to the terms contained therein in order to carry out their contractual obligations. This is evident and supported by exh 'H' of encl 13 at p 74 which showed the minutes of the meetings held between the plaintiff and the defendant where reference to PAM contract 98 was made. So, it can be said that the PAM contract remained unchallenged even after several meetings. Even in the plaintiff's notice to remedy the breach addressed to the defendant dated 13 July 2004 as seen in exh 'C' of encl 3, reference to the PAM contract was made and that notice was worded in this way:

> Date: 13 July 2004
>
> We refer to the letter of acceptance, which was duly acknowledged by you on the 16 October 2003 the terms whereof having been duly accepted by you.
>
> Please note, you are in breach of the following terms of the standard PAM (Pertubuhan Architect Malaysia) agreement and condition of building contract which form an integrated part of the agreement aforesaid:
>
> 1 Fails to proceed regularly and diligently with works.
>
> 2 You have also failed to adhere to the programme and has caused very serious delay which is much more than 10% in the completion of the works on site.
>
> We regret to note that for the last few days, the number of workers have been drastically reduced and the problem with the critical resources is getting more acute. There is virtually NO progress on site.
>
> TAKE NOTICE, you are required within fourteen (14) days from the date hereof inclusive of the date of issuance of the notice hereof remedy the breaches aforesaid, failing which it would be deemed that you are unable to remedy the breach and you shall be liable for termination of the agreement aforesaid in which event you shall (vacate) the site together with your servants, agents or workmen and all your belongings including the machineries forthwith upon the expiry of the

notice thereof to enable the employer to take possession of the site and to attend to the completion thereof.

[8] The defendant responded to the plaintiff's notice to remedy the breach and the defendant's response can be seen in exh 'C' of encl 3 and it was dated 27 July 2004. In that response, the defendant did not challenge the terms of the PAM contract at all. Even to the date of the filing of the present civil suit, the defendant had not challenged the terms of the PAM contract. And there was no evidence to show that the defendant had challenged the terms of the PAM contract. It was the submission of the plaintiff's counsel that the defendant cannot choose to accept part of the term of the agreement for their convenience and to reject the rest. At this juncture, there are passages in the judgment of the Court of Appeal in *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi Ahmad & Ors* [2005] 2 MLJ 32 that must be reproduced here because they struck a chord to the facts of the present case here. There at pp 35 to 36, Gopal Sri Ram JCA speaking for the Court of Appeal said:

> It is also a point of considerable significance that at no time throughout the material period when the parties were in communication with each other did the respondents reject the transaction out of hand on the ground that the appellants had not paid the balance of the 10% deposit within the 45 days limited by cl 2. Instead, we find in the record of appeal provided to us a letter from the respondents' solicitors dated 12 July 1993 in which they say that they have no objections to the terms of the draft agreement prepared by the appellants' solicitors and sent by them under cover of their letter dated 17 April 1993. Now, this was well outside the 45 days period specified in cl 2. That period expired on 23 February 1993.
>
> We therefore have here a situation whereby the parties have by their contemporaneous conduct subsequent to the making of the option agreement placed an interpretation on cl 2 of exh P2 to the effect that payment of the balance of the 10% was not to be made within the 45 days prescribed by that clause. Is it then open to a court to place a different interpretation on cl 2? With respect, we think not.
>
> We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Tools v Schuler AG* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See, *American Surety Co of New York v Calgary Mining Co Ltd* (1919) 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (In liquidation) v Texas Commerce Bank* [1982] QB 84; *Boustead Trading (1985) Sdn Bhd v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331.

[9] In the present case too, by looking at the defendant's conduct and the contemporaneous documents it showed clear proof of an implied acceptance of the terms of the PAM contract by the defendant. Indeed the defendant had carried out its obligations in reference to the terms of the PAM contract. In *Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd* [2002] 5 CLJ 391, after a

trial, I had this to say in regard to the execution of a formal agreement as reflected at p 430 of the report:

> Reverting back to the requirement of execution of a 'formal agreement', I have this to say. That the facts positively point to the proposition that the parties had already entered into a legally binding contract where the execution of a formal agreement was a mere formality based on the conduct of the parties pursuant to the exchange of the two documents between the parties and the fact that the contract had already become an executed contract by the conduct of the parties again pursuant to the exchange of the two documents between the parties. The available evidence too did not evince a situation that the parties intended that their rights and obligations under the two documents should be suspended until the 'formal agreement' was finalised and executed. At any rate, even if the defendant intended that its rights and obligations under the two documents should be suspended until the 'formal agreement' was finalised and executed, the facts and the evidence as adduced during the trial showed that the proposed draft 'formal agreement' in exh 'D3' was only forwarded to the plaintiff by way of a letter dated 26 February 1996 as seen in exh P10 which was approximately after a period of five months from the time that the plaintiff had commenced providing the services to the defendant. It was part and parcel of my judgment that the defendant's act of allowing the plaintiff to provide the services at the LIYC was indicative of the intention of the parties to enter into a valid, legal and binding contract and that the execution of a 'formal agreement' would only amount to a mere formality.

[10] Earlier on at p 405 of the report, I referred to the case of *Alexander Brogden & Ors v The Directors, &c, of the Metropolitan Railway Co* [1877] 2 AC 666 (HL) and I had this to say:

> As can be seen, the circumstances in regard to the conduct of both parties in *Alexander Brogden*'s case established a binding contract between them even though the agreement which was reduced into writing as a draft had not been formally executed by either party. Indeed this was the judgment of the House of Lords in *Alexander Brogden*'s case. The House of Lords too held that in such a case where the word 'approved' was written by one of the parties at the end of the draft agreement it must be taken as an approval of the substance of the draft, and not, as in the case of a conveyancer's or solicitor's draft, an approval of the mere form. The House of Lords also held that on these facts and the actual conduct of the parties established the existence of such a contract and since there had been a clear breach of it, *Brogden* must be held liable upon the contract.
>
> It was sought to distinguish the facts in *Alexander Brogden* with the facts in the present case. Here, it was pointed out that the draft formal agreement that was extended to the plaintiff was not signed nor returned to the defendant. But as I said, the facts in *Alexander Brogden* can never be at par with that of the present case. No two cases can be the same. Be that as it may, it would be ideal to examine the issue of the day by examining the following crucial aspects of the case.

[11] Thus, in my considered view, on the facts the defendant was bound by the PAM contract although it was not executed because the defendant has

impliedly and by conduct performed their obligations in the context of the terms of the PAM contract.

[12] Was there, on the totality of the facts, a *bona fide* serious issue to be tried? If there was none, the matter ended there and the prayers as sought for by the plaintiff in encl 4 would be refused. But if there are serious questions to be tried, I must investigate further and I must consider where the justice of the case lies or where the balance of convenience tilts and, in the course of which, l must take into account all the relevant matters which include the practical realities of the case. Finally, I must always remember that the remedy which the plaintiff sought was entirely discretionary and that all discretionary considerations must be taken into account by me.

[13] I have considered the relevant materials and the submissions of counsel on both sides and I must say that serious issues were raised for this court to determine, namely:

(1) the lawfulness of the termination;

(2) the defendant's unlawful removal of the properties from the site in breach of clause 25.4 (i) of the PAM contract;

(3) the defendant remaining in possession of the site after determination of the contract;

(4) the plaintiff has suffered damages and continues to suffer damages as a result of the defendant remaining on the site;

(5) the defendant's claim for the balance of the contract sum due to them and the plaintiff's claim to the right of set-off against them in respect of the damages for liquidated and ascertained damages payable to the plaintiff by the defendant;

(6) the substantial damages for liquidated and ascertained damages may be claimed by the end purchasers of the numerous parcels in the said works;

(7) there is a probability that if the delay becomes substantial purchasers may rescind the sale and purchase agreement and demand the refund of the purchase price including damages and costs which may result in the proprietor becoming insolvent; and

(8) the plaintiff's right to set-off from their entitlement to liquidated and ascertained damages against any claim of the defendant for any monies (if any) due to them on a quantum meruit basis.

[14] The justice of the case or the balance of convenience would certainly lie in favour of the plaintiff and in exercising my discretion, the injunctions sought by the plaintiff should be allowed forthwith.

[15] It must be borne in mind that on or before the execution of the letter of acceptance, the plaintiff has informed the defendant that the said works must be completed in accordance with the work programme as agreed upon by both the plaintiff and the defendant. And in compliance with the terms of the PAM contract, the plaintiff must hand over the said works upon its completion to the proprietor who in turn must deliver vacant possession to the numerous purchasers who have purchased it from the proprietor.

[16] The defendant had breached clause 25.1 (i) of the PAM contract by:

(a) stopping work on 14 December 2004, on 15 December 2004, on 23 February 2005 and on 24 February 2005;

(b) delaying the completion of the said works by approximately 100 days and this was in breach of the work programme as agreed upon between the plaintiff and the defendant; and

(c) failed to adhere to the work programme.

[17] And this prompted the plaintiff to send a notice determining the employment of the defendant by way of a letter dated 25 February 2005 as reflected in exh 'G' of encl 3. It would be ideal, at this juncture, to set out the events leading to the determination of the employment of the defendant under the PAM contract:

(1) letter dated 12 August 2004 as per exh 'D' of encl 3 informing the defendant of the delay in the works and suspension of the works on 10July 2004 and 11 July 2004 and the proposed steps to be taken to speed up and complete the said works;

(2) site memo dated 22 February 2005 as reflected in exh 'E' of encl 3 issued by the plaintiff to the defendant stating that the latter had stopped work on 22 February 2005 and instructing the defendant to resume work immediately;

(3) site memo dated 23 February 2005 as seen also in exh 'E' of encl 3 issued by the plaintiff to the defendant stating that the latter had stopped work on 23 February 2005 and again instructed the defendant to resume work immediately;

(4) failure to adhere to the work programme as agreed upon by the defendant as reflected in exh 'F' at p 24 of encl 7;

(5) there was, by way of a reiteration, a delay of approximately 100 days and in the notice of termination or determination of the employment of the defendant dated 25 February 2005 as reflected in exh 'G' of encl 3 as alluded to earlier it was stated that such delay can be translated to be 'a delay of about 20% of the extended completion date';

(6) the slow progress in carrying out the said works which in turn delayed the completion of the same as reflected in the same letter marked as exh 'G' of encl 3;

(7) there was a general failure on the part of the defendant to speed up the progress of the said works in order to reduce the delay; and

(8) the inability of the defendant to complete the said works in time in order to hand over to the proprietor who, in turn, must deliver vacant possession to the purchasers who have purchased the units from them.

[18] I must be forgiven for reproducing cl 25.0 of the PAM contract (the relevant parts):

25.0 Determination by employer

25.1 Defaults by contractor

The employer may determine the contract without prejudice to any other rights and remedies which he may possess if the contractor makes default in one or more of the following instances:

(i) without reasonable cause wholly suspends the carrying out of the works before completion thereof. Reasonable cause shall mean compliance with an instruction from the architect or compliance with a direction or an order from a statutory or Governmental body.

(ii) fails to proceed regularly and diligently with the works

(iii) has persistently refused or failed to comply with a written instruction from the architect.

(iv) has persistently refused or failed to comply with a written instruction from the architect

[19] Then there is cl 25.2 of the PAM contract which states as follows:

25.2Determination of employment of contractor

The architect may then give the contractor notice by registered post or recorded delivery specifying the default subject to that such notice is not given unreasonably or vexatiously. If the contractor continues with such default for fourteen days after receipt of such notice or at any time thereafter repeat such default (whether previously repeated or not), then the Employer may within ten days after such continuance or repetition by letter sent by registered post or recorded delivery forthwith determine the employment of the contractor under this contract.

[20] There is also cl 25.4 of the PAM contract which states as follows:

25.4 Rights and Duties of Employer and Contractor on Determination of Employment of Contractor

In the event that the employment of the Contractor is determined under Clause 25.1, 25.2 or 25.3 and so long as it has not been reinstated and continued the following shall be the respective rights and duties of the Employer and the Contractor.

[21] And it is followed by cl 25.4(i) of the PAM contract where the word 'contractor' would refer to the defendant and the word 'employer' would refer to the plaintiff and it states as follows:

> 25.4 The contractor shall vacate the site and return site possession to the employer who may employ and pay other persons to carry out and complete the works. He or they may enter upon the works and use all temporary buildings, plant, tools equipment, materials and goods that belong to the contractor intended for and delivered to and placed on or adjacent to the works, and may purchase all materials and goods necessary for the carrying out and completion of the works.

[22] I must reiterate that the defendant was specifically told prior to the letter of acceptance that the proprietor requires the said works to be completed within the period stipulated in the letter of acceptance and that the proprietor must deliver vacant possession of all the parcels sold to the purchasers within the time period as stipulated in the sale and purchase agreements made between the proprietor and the purchasers, failing which the plaintiff will end up paying the proprietor liquidated and ascertained damages which is estimated to run into millions of ringgit. The list of the names of the purchasers can be seen in exh 'G' of encl 7.

[23] Since the defendant has substantially delayed, stopped work, suspended work and was progressing very slowly in their work with no credible assurance given as to when the defendant would complete the said works, the plaintiff was left with no alternative but to determine the defendant's employment and seek another contractor to complete the remaining works on or before 12May 2005. The plaintiff was even magnanimous and granted an extension of the completion to 10 July 2005.

[24] Clause 25.4(i) of the PAM contract makes it abundantly clear that once the employment is determined the defendant as the contractor must return possession of the site to the plaintiff as the employer and the latter is entitled to use all temporary buildings, plant, tools, equipment, materials and goods that belong to the defendant as the contractor (see the PAM contract as per exh 'B' of encl 3). So it is appropriate to say and I so say that cl 25.4(i) of the PAM contract confirms the proposition of the law that the defendant as the contractor must return possession of the site immediately in order to enable the plaintiff as the employer to mitigate any loss which may result as a result of the defendant's breach irrespective of whether the determination of the PAM contract is lawful or not. Since the defendant challenges the lawfulness of the determination of employment, there now exists *bona fide* serious question to be tried and until the final disposal of the civil suit preceded by arbitration under cl 34.1 of the PAM contract the injunctions sought by the defendant in encl 4 ought to be granted by this court.

[25] It must be borne in mind that the letter of acceptance dated 16 October 2003 does not provide for the parties to seek an extension of time. It does not

also provide for the issuance of notice to remedy the breach. Therefore the reliance on the PAM contract must necessarily be implied by the parties. Atany rate, as I said earlier, the notice to remedy the breach was sent by letter dated 13 July 2004 as reflected in exh 'C' of encl 3. Now, since the notice to remedy the breach was given and the defendant continued to be in breach of the terms of the PAM contract, the plaintiff had on 25 February 2005 determined the defendant's employment forthwith as required under cl 25.2 of the PAM contract. So, it is correct to say that the termination is lawful.

[26] Next, it has been argued that the defendant was nothing more than a mere licensee. The granting of possession of the site to the defendant was more in the nature of a mere licence. As a licensee the defendant would only enjoy a mere possessory right and not a proprietary right. And once the licence is revoked, in the present case it was determined lawfully, then the defendant must vacate and return possession of the site to the plaintiff. By continuing in occupation of the site, the defendant has become a trespasser.

[27] The defendant had impliedly accepted the determination by removing those properties belonging to them at the site. And the plaintiff had duly lodged police reports against the defendant for removing the materials or properties from the site. The police reports can be seen in exh 'F' of encl 3. The defendant too had through its solicitor's letter dated 1 March 2005 acknowledged the removal of the materials or properties from the site and that letter can be seen in exh 'B' at p 13 of encl 7. Furthermore, the police report lodged by the project manager by the name of Amran bin Sai'on on 25 February 2005 as seen in exh 'AS–9' of encl 8 revealed the following state of affairs:

> sebagai projek manager di 'Tower' Jalan Munshi Abdullah KL ingin membuat laporan polis bahawa hari ini mulai jam lebih kurang 2200 hrs akan membawa keluar barang-barang kepunyaan syarikat kerana ingin berhenti daripada terus menyiapkan projek tersebut atas sebab-sebab tertentu.

[28] And that police report of Amran bin Sai'on was clear evidence of:

(a) the breach of cl 25.4 (i) of the PAM contract by the defendant when those properties or materials were removed from the site;

(b) and an intention on the part of the defendant not to continue with the said works at the site; and

(c) it clearly showed the acceptance of the notice of determination of the defendant's employment.

[29] The defendant's intention of not further proceeding with the said works can be seen in two letters emanating from the sub-contractors. The letter dated 25 February 2005 alluded to the 'verbal instruction to stop work' from the defendant and that letter can be seen in exh 'D' of encl 20. Another letter dated 26 February 2005 confirmed that 'all activities at site have ceased'

and that letter can be seen in exh 'B' of encl 20. Thus, all these documentary evidence showed that the defendant has decided not to further continue with the said works. That being the case, the crucial question to pose would be this: has the defendant any right to hold onto possession of the site? It would be justifiable if the defendant were to return possession of the site to the plaintiff so that the latter could immediately employ another sub-contractor to continue and complete the said works at the site.

[30] I have said that the defendant had clearly made its intention known that it would not proceed further with the said works. In a construction contract, the plaintiff need not wait for the completion period to expire because it would be too late for the work to be completed within a given time schedule. Even before the determination of the contract on 25 February 2005, the defendant had shown its intention not to proceed with the said works when they issued notices dated 22 February 2005 to their sub-contractors to cease work. It seemed to me that the only reason why the defendant was still holding onto the site and holding possession of the site was because the defendant's claim for work has not been settled and that the defendant would only return and give possession of the site to the plaintiff on settlement of the sums claimed (see the letter dated 1 March 2005 at exh 'B' of encl 7 and the letter dated 2 March 2005 at exh 'C' of encl 7). The defendant was more interested in being paid and indeed the defendant's claim was entirely monetary. That being the case, damages would be an adequate remedy. For the defendant, itwould be ideal to seek recourse by way of a civil suit or even by way of an arbitration in order to recover their money for work done rather than to hold onto the site. In fact, the joint valuation carried out by the plaintiff and the defendant as seen in the letter dated 7 March 2005 at exh 'E' of encl 7 was done entirely with the view to ascertain the amount claimed by the defendant. This very letter — referring to the letter at exh 'E' of encl 7, confirmed categorically that the defendant's sole and only interest was and is confined to ascertaining the amount payable to them and that the defendant has no interest whatsoever to complete the said works. The defendant has, in fact, legally abandoned the site. There were serious questions to be tried in this case. In considering where the justice of the case should lie, I am certainly entitled to take into account all relevant matters germane to the case at hand. Thus, the fact that the defendant owes the plaintiff the sum of RM10,414,469.59 being the liquidated and ascertained damages which sum is now the subject matter of a commercial suit vide number D7–22 546 of 2005 should be taken into account by me. In that commercial case, the defendant here is represented by counsel. So, the relationship between the plaintiff and the defendant has changed its complexion. It would be that of creditor and debtor relationship. It was argued that by reason of the debt owed by the defendant to the plaintiff, the defendant's claim, if any, should now be extinguished. And it was also argued that since no money is owed by the plaintiff to the defendant, the continued holding onto the site by the defendant was entirely intended to frustrate and

damage the plaintiff's reputation and right to possession of the site. It seemed that the plaintiff's claim for the sum of RM10,414,469.59 in the commercial court was supported by the engineer's certificate of M/s Zaidun Heong Sdn Bhd. It seemed also that the defendant did not challenge the engineer's certificate and so it was argued that the defendant would have an uphill task in the commercial court.

[31] In addition to all these, another factor to consider in weighing the scale of where the justice of the case should lie would be the issue of the defendant's financial incapacity. The cause of the substantial delay in completing the said works at the site lie in the defendant's financial inability and incapacity to secure adequate materials and to employ workers in order to complete the said works as scheduled under the work programme. In fact, the plaintiff gave financial help to the defendant by advancing a sum of RM1,125,549.69 to enable the defendant to pay their sub-contractors and suppliers and this can readily be seen in exh 'G' of encl 3. Ample documentary evidence has been exhibited to show the defendant's incapacity to pay their workers. The workers even went on strike for non-payment of wages. The site diary as per exh 'AS–1' of encl 8 at p 7 carries this legend:

> Mogok. Not paid.

[32] Another site diary at exh 'AS–1' of encl 8 at p 9 carries this tale:

> Today general workers and signalmen on strike (mogok) because not paid salary.

[33] I was asked not to follow the Court of Appeal case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* and the Supreme Court case of *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241. It was emphasised that *Keet Gerald* was in relation to a temporary interlocutory injunction restraining the defendants from dealing with the parcel of land while Alor Janggus was in relation to a temporary interlocutory injunction restraining a company from effecting any transfer of shares. It was submitted that these two cases should not be applied to the facts of the present case. It was also submitted that the present case at hand concerned a mandatory injunction which attracted different tests and principles. Interestingly, the Court of Appeal in *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 held the view that even in an application for a mandatory injunction there was a need to go through the steps as established by *Keet Gerald*. With respect, it is time for the Federal Court to re-visit *Keet Gerald* and *ESPL*.

[34] The bulk of the reliefs sought in encl 4 centred on mandatory injunctions. It is now trite law that in an application for interlocutory mandatory injunctions, the ordinary *American Cyanamid* principles (known as *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504) are not applicable. What the applicant has to show would be an unusually strong and clear case and that there are special

circumstances in existence before the court would grant relief to the applicant (*Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402). In short, in seeking an interlocutory mandatory injunction the applicant must show a very strong and unusual case.

[35] Be that as it may, I am bound by the Court of Appeal decisions in *Keet Gerald* and in *ESPL*. My views on the law are of no consequence at all, yet, Imust state them. At the end of the day, this judgment would go through the hands of the Court of Appeal judges. But having said all these, I must categorically say that I have the challenging task to state the law as it stands and I must state the law positively and definitely. Thereafter, I have to delicately apply the law to the facts of this case at hand.

[36] Now, the mandatory injunctions sought for in encl 4 would give the plaintiff the entire relief. So, the plaintiff has to show an unusually strong and clear case. The following authorities would suffice to support this simple proposition of the law:

(1) The Supreme Court case of *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192, where Syed Agil Barakbah SCJ delivering the judgment of the court sets out the law in these lucid terms (see pp 193 194 of the report):

> The discretionary power of the court to grant a mandatory injunction is provided by s 53 of the Specific Relief Act, 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction granted only in exceptional and extremely rare cases as was held in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109 and confirmed by the Federal Court in *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result. (See *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271, 273 and *Shepherd Homes Ltd. v Shadham* [1971] 1 Ch 340, 349). Where the case is one of urgency, O 29 r 1 (2) RHC 1980 allows an application to be made *ex parte*. We are satisfied that the learned judge on the facts and surrounding circumstances of this case rightly concluded that this was an exceptional case where the court was justified in granting a mandatory injunction on an *ex parte* application before the trial.

(2) In *Cayne & Anor v Global Natural Resources plc* [1984] 1 All ER 225 (CA), the headnotes carry the following write-ups on the law:

> Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party. In such a case, the

court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim at a trial.

(3) In *ESPL*, it was stated as follows:

> The mandatory injunction sought gives the defendant at the interlocutory stage the whole of the relief it claims under its counterclaim. Once granted, there would be no need for a trial on the issue of a trust. Applying *Cayne v Global Natural Resources Plc* [1984] 1 All ER 245 and *NWL Ltd v Woods* [1979] 3 All ER 614, it was essential that a higher burden be placed on the defendant by requiring it to prove a case on the merits before deciding whether the orders sought should be granted.

(4) In *MBf Property Services Sdn Bhd v Madihill Development Sdn Bhd (No 2)* [1998] 4 CLJ 136, the plaintiff there sought for a mandatory injunction against the defendant to remove the concrete bollards and to restrain the defendant from obstructing the plaintiff from having free access and thorough fare through the access road. The court, after the full trial, dismissed the plaintiff's claim and allowed the defendant's counterclaim. The court also ordered that damages to be assessed. At pp 157 to 159 of the report, the court had this to say:

> As can be seen from the pleadings both parties sought for mandatory injunctions. Simply put, a mandatory injunction is based on a final determination of the rights of the parties and is permanently to prevent infringement of those rights and obviate the necessity of bringing action after action in respect of such infringement. By their very nature, mandatory injunctions have more serious consequences on the parties than interlocutory injunctions. Thus, a party in complying with a mandatory injunction is required to take positive steps and may in the process have to expend money and effort. The mandatory injunctions that both parties sought for have irreversible consequences and for the defendant it would certainly maintain the status quo.
>
> The Americans regard a mandatory injunction as one granted after trial and which finally disposes of the injunction suit: *Jackson v Bunnell* 133 NY 216: 21 NE 79. It forms part and parcel of the judgment upon a hearing on the merits (*Traders Bank v Wright* 17 Man 695), and it can properly and legally be ordered after the final judgment (*Riggins v Thompson* 74 SW 14; and *Day v Snee* 3 Ves & B, 170).

In England, the law is the same. *Kerr on Injunctions* (6th Ed) at p 30 had this to say:

> After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong unless there is something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial.

The same is also true for the present defendant here who sought for that mandatory injunctions in their counterclaim. No laches were pleaded by the parties and non-existed and there was no need to consider this point. A perpetual injunction is conclusive in nature. The jurisdiction to grant a mandatory injunction is founded on equity of relieving a party from the necessity of bringing action after action, as I said earlier, for every violation of a right. It is said that a mandatory injunction should not be granted to protect a right having only a limited duration; in such a case it is said that the injunction should be limited to the period of the plaintiff's interest in the subject matter of the action (*Savory v Egyption Oil Co* (1904) 48 Sol J 573 and *Clowell v St Pancras Borough Council* [1904] 1 Ch 707).

Section 52(1) of the Specific Relief Act 1950 enacts that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. It is also said that it may be granted not to prevent a multiplicity of suits and the further harassment of the plaintiff in connection therewith (*Gur Pershad v Khuda Baksh* 81 C 687). But with respect *Gur Pershad*'s case should be read in the context of our s 52(3)(e) of the Specific Relief Act 1950 where it enacts that where the injunction is necessary to prevent a multiplicity of judicial proceedings a perpetual injunction may be granted. Surprisingly s 52(3)(e) of the Specific Relief Act 1950 gives the court the power to grant a perpetual injunction 'when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property'. Here, on the facts it was the plaintiff that invaded the defendant's right to the enjoyment of Lot PTD 26138 by constructing an access road right across the defendant's land, on ground level. Here the act of the plaintiff was of such a character that it must inevitably result in injury to the defendant. Under English law, the right to an injunction is a prima facie right, and any person who has sustained material injury is entitled to it. Here, the defendant sustained injury. I may add that the defendant was entitled to a mandatory injunction restraining the plaintiff and/or Asal Gemilang Sdn Bhd and/or Mega Canggih Sdn Bhd and/or their agents and/or their servants and/or their successors in title from constructing the access road, encroaching and/or using the access road across the defendant's land and, consequently, the plaintiff must reinstate the defendant's land to its original condition.

In *Tay Tuan Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276, trespass was in issue when the retaining wall and structure encroached on the plaintiff's land and Thean J had this to say at p 278 of the report:

The second relief asked for is an order that the defendant do pull down and remove the retaining wall and erect a new wall in place thereof but within the boundary of the defendant's land. It is in effect a mandatory injunction and the question is whether it should be granted in this case. 'The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course'. Every case must depend essentially upon its own particular circumstances'. (per Lord Upjohn in *Redland Bricks Ltd v Morris and Anor* [1970] AC 652, 665). This is a general principle, and I now turn to consider the circumstances of this case.

Raja Azlan Shah J (as his Majesty then was) in *Re Court Hill Canteen* [1972] 2 MLJ 257 observed:

> I think the law is very clear. A perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail. There is another point. One can bring an action for perpetual injunction before filing a writ of summons in the case of urgency. This is clear from the case of *L v L* [1969] 1 All ER 852.

Halsbury's Laws of England (4th Ed, Vol 24) p 595, para 1069, under the heading of Form of Mandatory Injunction reads:

> It was formerly the practice of the court of chancery to word mandatory injunctions in an indirect prohibitory form, but now all such injunctions should be worded in the direct mandatory form, such as directing buildings to be pulled down and removed. There is now no distinction in principle between the negative and the position form …

Lee Hun Hoe CJ (Borneo) in *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45 FC said at p 55 of the report:

> The grant of a mandatory injunction is entirely discretionary. Every case must depend essentially upon its own particular circumstances. It is a jurisdiction to be exercised sparingly and with caution but in a proper case unhesitatingly. When the court decides to grant such an injunction then the court must see to it that that person against whom it is granted knows exactly what he has to do. It might be of interest to refer to *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 where their Lordships of the Privy Council stated that it would not interfere with the exercise of the discretion by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice.

> On the factual matrix of the present case, I have no hesitation in granting the mandatory injunctions sought for by the defendant.

(5) In *Nottingham Building Society v Eurodynamics Systems Plc & Ors* [1993] FSR 20 at p 468, it was held (see the headnotes):

> (2) In granting the mandatory injunction sought, the court felt a high degree of assurance that the plaintiff would be able to establish its entitlement at trial. In the circumstances of this case, the risk of injustice if the injunction was refused sufficiently outweighed the risk of injustice if it were granted.

[37] I certainly have the jurisdiction to grant the mandatory injunctions in encl 4 on an interlocutory basis (*Luganda v Service Hotels Ltd* [1969] 2 Ch 209; *Thomas M Heysek v Boyden World Corp* [1989] 1 MLJ 219; and *Bonner v Great Western Railway Co* (1883) 24 Ch D 1). No one can deny that.

[38] Mandatory interlocutory injunctions carry with it serious consequences as compared to prohibitory injunctions. The courts are always careful and would be slow in allowing it. In the words of Chan J in Thomas *M Heysek v Boyden World Corp* at p 222:

> Although the relief that is being sought by the defendant is interim in form, it is, in the circumstances of this case, mandatory in effect …. It has the effect of altering the status quo rather than preserving it. Accordingly, a court should be slow in granting it.

[39] But that doesn't bar the courts from granting mandatory injunctions. I was asked to accede to encl 4 and grant the orders accordingly.

[40] The learned counsel for the defendant argued that from the exchange of affidavits the plaintiff has not established its case, not even on a *prima facie* basis. It was pointed out that there was a dispute as to whether the plaintiff was entitled to terminate the letter of acceptance. It was also pointed out that there was a dispute as to whether the PAM contract would apply to the present case. It was surmised that without clear and positive evidence on either of these two matters, the plaintiff's right to re-take possession of the site was highly questionable.

[41] The learned counsel for the defendant further submitted along the following lines. That there was a dispute as to whether the plaintiff could rely on the delay on the part of the defendant when the plaintiff has given the defendant an extension of time till 10 July 2005 to complete and hand over the said works. There was also a dispute as to whether the plaintiff could oust the defendant from the site after giving the defendant memorandums requiring them to proceed with the work just a few days before the notice of termination. Then there was also a dispute as to whether the plaintiff could terminate the PAM contract when there was only a provision for liquidated damages in the event of delay. All these showed that the plaintiff has failed to establish a strong case in respect of all those issues.

[42] The learned counsel for the defendant posed a pertinent question. She asked whether this court should exercise its discretion in favour of the plaintiff when the plaintiff has taken matters into its own hands by entering upon the site and remaining there and carrying out work therein. She drew my attention to the tenth affidavit of the defendant which she filed on 24 May 2005 at 3.12pm and that affidavit was not even found in the court file when I heard the submissions of counsel on both sides, by way of a continuation, on 25 May 2005. In fact, she handed me the tenth affidavit of the defendant in chambers in the presence of the learned counsel for the plaintiff. I ordered the tenth affidavit of the defendant to be marked as encl 29 and it was accordingly done by the court interpreter. The learned counsel for the plaintiff objected to the late filing of encl 29 and he urged me to ignore encl 29. I was curious and I proceeded to read encl 29. It consisted of six paragraphs and, for brevity, I shall reproduce paras 3 to 6 of encl 29:

> 3 On 20 May 2005, when the plaintiff's injunction application was fixed for continued hearing, I was informed by Pilecon's security guard Ganesan a/l Sreetharan, that at about 10am, he was beaten up by eight persons. The said eight persons then entered the site.

4 I immediately inform the police about the incident. The said eight persons left the site before the arrival of the police. I verily believe that the said eight persons are the representatives of and acting under the instructions of Mayland Boulevard Sdn Bhd

5 A copy of the police report lodged by Ganesan a/l Sreetharan on 20 May 2005 is annexed herewith and marked as exh 'PA–1'.

6 On 23 May 2005 and 24 May 2005, I witnessed the plaintiff bringing in approximately 20 workers and commenced work at the site together with approximately 30 representatives standing guard at the site.

[43] It was an allegation of eight persons beating up the defendant's guard. The eight persons were said to be the representatives of the proprietor. The defendant's guard had lodged a police report and that police report showed the defendant's guard to be a young male Indian and the eight assailants were also male Indians. It sounded more like an Indian movie with a fighting scene at the 'Tower', so to speak. It was also alleged that the plaintiff brought approximately 20 workers to the site and commenced work guarded by 30 representatives who stood as guards. All these allegations would stir the adrenalin gland. By referring to encl 29, the learned counsel for the defendant sought to show that the plaintiff came to court with unclean hands. That was a noble idea but, with respect, encl 29 came too late in the day. It was unfair on the part of the defendant to file encl 29 in the midst of the continuation of the submissions of the parties in regard to encl 4.

[44] It was submitted on behalf of the plaintiff that the proprietor had entered the site in order to clear the debris and attended to some works unrelated to the contract subsisting between the plaintiff and the defendant. It was further submitted that the police reports exhibited as exh 'B' to encl 19 showed that the defendant had deliberately caused disturbances at the site for the purpose of giving a 'bad name' to the plaintiff. In fact, so the submission goes, the presence of the plaintiff at the site was solely intended to protect the plaintiff's goods and materials. It was reiterated by way of a submission for the plaintiff that the activities around the site were done by the proprietor and not by the plaintiff and it was done solely to clear the debris left behind by the defendant and other miscellaneous works unrelated to the project. It was stressed by the learned counsel for the plaintiff that there was no interference to the possession of the site by the defendant.

[45] According to the learned counsel for the plaintiff, the police reports in exh 'B' to encl 19 reflected the rough tactics employed by the defendant against the plaintiff's guards who were there to protect the interests of both the plaintiff and the proprietor. It was stressed that the defendant's continued resistance as at the date of this hearing showed that the defendant was still in possession of the site without any interference from the plaintiff.

[46] In regard to the photographs as exhibited in exh 'PA–1' of encl 15, it was pointed out that they showed minor works being carried out by the

proprietor to the exterior of the building and it had not interfered with the said works. Finally, it was submitted that the series of affidavits filed by the defendant showed the desperateness of the defendant to seize any minor infraction of the plaintiff and to incorporate them in an affidavit in order to impair and destroy the plaintiff's position from obtaining the mandatory injunctions as sought for in encl 4.

[47] I was entitled to take into account all these factors when weighing the application in encl 4. These were matters that should be considered by this court and they were certainly relevant.

[48] Next, it was argued that the correspondences marked as exhs 'A', 'B', 'C', 'D' and 'E' of encl 7 should not be considered by this court as they were made in the context of without prejudice communications. In *Oh Kuang Liang v Associated Wood Industries Sdn Bhd* [1995] 4 MLJ 390, I had occasion to consider in extenso without prejudice communications. All the correspondences marked as exhs 'A', 'B', 'C' and 'E' of encl 7 were not marked 'without prejudice' and so they must be held to be admissible in evidence. Exhibit 'D' of encl 7, in the body of the letter, the words 'without prejudice' were employed but the parties were not, at all, negotiating a bargain to settle the dispute — rather the parties were merely carrying out their mutual obligations under the PAM contract. The same would also be true for exhs 'A', 'B', 'C' and 'E' of encl 7. They were written not with a view to settle the dispute between the parties. So there was nothing to prevent them from being exposed.

[49] These correspondences were made to fulfil and to comply with the PAM contract in that after determination, the parties were contractually bound to ascertain and to carry out the following obligations as per cl 25.4 (iv) of the PAM contract:

(a) the amount, if any, owed to the defendant for the value of the works done by the defendant as at the date of determination;

(b) for determination thereof, a verification or valuation of the accounts must be carried out by both the plaintiff and the defendant; and

(c) the loss and expense incurred by the employer as a result of the determination.

[50] The contents of the correspondences were drafted solely for the purpose of fulfilling the above obligations. It must be borne in mind that the parties while carrying out their contractual obligations under the PAM contract could not be said to be acting in a manner prejudicial or adverse to one another.

[51] Next, it was argued by the defendant that even if cl 25 of the PAM contract was applicable (which the defendant vehemently denied), the plaintiff has no valid ground to justify the termination of the PAM contract. It was submitted that the plaintiff alleged that the defendant had stopped work on

certain days and that there was a delay in the work schedule. In response to this, the defendant categorically denied that it was so. According to the defendant, the plaintiff's allegation that the defendant had stopped work was totally unsubstantiated and contrary to the contemporaneous documents like the site diary. It was further submitted that the plaintiff's conclusion that the defendant was incapable of completing the work within the completion date was entirely without basis. According to the defendant there was no programme for the completion of the said works. With respect, from my chambers it can clearly be seen that the said works could not be completed even by the extended date of 10 July 2005. Indeed any new contractor employed by the plaintiff to complete the said works would not be able to complete it on 10July 2005. It is simply impossible to complete the said works on that date. In fact, from the bar, the learned counsel for the plaintiff informed this court that it would take another eight to 10 months to complete the remaining works calculated from 10 July 2005. According to the learned counsel for the plaintiff, at the rate of RM22,000 per day for liquidated and ascertained damages the plaintiff would have to fork out approximately RM6 million to the purchasers for late delivery of vacant possession. I sincerely hope that the plaintiff would pay the purchasers this sum when the time comes. Be that as it may, according to the learned counsel for the plaintiff, if the plaintiff were to appoint a new contractor the plaintiff cannot impose liquidated and ascertained damages ('LAD') on the new contractor. The imposition of the LAD could only be imposed after the expiry of the new contractual term. And in the event the defendant remained in possession of the site and minded to proceed with the said works, the defendant was certainly liable to pay the LAD to the plaintiff which may approximate to the tune of RM6 million since the completion of the said works would be way beyond the current extension period scheduled to expire on 10 July 2005.

[52] The learned counsel for the defendant pointed out that on 10 July 2004 and 11 July 2004, works slowed down due to the shortage of steel bars which was crucial for the production of reinforced concrete. But work, according to the defendant, did not stop. It merely slowed down. A submission was made to the effect that the construction industry was severely affected by the nationwide shortage of steel bars then. It was submitted that due to the overwhelming international demand for steel, in particular from China, local prices for the production of steel bar skyrocketed to such a level that many manufacturers found it unprofitable to manufacture and sell steel bars to the local market. In order to overcome the problems arising from the shortage of steel bars, the defendant had undertaken various productive measures including:

(a) buying any available sizes of steel bars offered by the defendant's supplier;

(b) buying steel bars that were substantially priced — much more than the Government controlled ceiling price;

(c) as a result of the different sizes of steel bars that the defendant had in their stock, the defendant proceeded to study and was proposing to substitute the contractual sizes with other sizes of steel bars; and

(d) drawing and submitting alternative designs of column with concrete to the consulting engineers in order to reduce the usage of steel reinforcement in the column construction.

[53] In short, it was submitted that the defendant used their best efforts to source steel bars. All these were said to have been made known to the plaintiff and the shortage of steel bars was highlighted to the plaintiff at the site coordination meeting number 19 and to M/s AJS Architect as reflected in the defendant's letters dated 16 February 2004, 24 February 2004 and 4 March 2004. These letters were said to have been copied to the plaintiff.

[54] I cannot help but feel that both parties were trying to paint as bad a picture as possible of the other side. The plaintiff said that the defendant's employment has been terminated. The defendant disputed this and insisted that they should continue completing the said works. The plaintiff alleged that the defendant took a part of the payment of the sum of RM1.4 million because of its financial constraints. But this was vehemently denied by the defendant. It was pointed out that as at 28 February 2005, amounts of RM648,379.66 and RM700,000 on payment certificates numbers 16 and 17 respectively were due and payable by the plaintiff to the defendant. After deducting the sum of RM1,125,549.69 advanced by the plaintiff to the defendant, there was a sum of RM222,829.77 due from the plaintiff to the defendant as at 28 February 2005. This net amount of RM222,829.77 has not taken into account the amount of RM1,634,077.36 due to the defendant pursuant to progress claim number 18 for work completed by the defendant for the month of February 2005. It was said that the final amount owing by the plaintiff to the defendant came up to RM222,829,77 inclusive of RM1,634,077.36 giving the total of RM1,856,907.13.

[55] In regard to Amran Sai'on's police report dated 25 February 2005 which stated that he intended to stop work, the defendant sought to explain it by stating that that police report was lodged by Amran Sai'on on his own initiative due to the urgency of the matter and the fear for the safety of the defendant's employees. The stand of the defendant was this. That the police report did not suggest that the defendant had accepted the termination. It was also submitted that the removal of the machineries from the site did not show the defendant's intention to cease work. According to the defendant, the challenge to the termination can be seen in the defendant's letter dated 1 March 2005 and in the defendant's subsequent police report (see the averment at para 36 of encl 16). According to the defendant, the machineries belong to them and other third parties and that the defendant was entitled to remove it for other projects. It was also said that the sharing of resources would not affect the said works at the site.

[56] At the end of the day, the crucial question to pose would be this:

[57] Would the balance of convenience (or the justice of the case) favour the granting of the injunctions both mandatory as well as prohibitory as prayed for in encl 4 by the plaintiff? I would answer this question in the affirmative in favour of the plaintiff. But if I were to refuse the prayers in encl 4 and permit the defendant to hold onto the site, the consequences would be as follows:

(1) the said works will not be completed bearing in mind that the defendant in the affidavit affirmed on 17 March 2005 by Amran bin Sai'on as per encl 8 has incorporated a police report marked as exh 'AS–9' which stated that the defendant has ceased work and would not continue with the completion of the said works and that they have removed all their machines, tools and materials from the site;

(2) the trial of the civil suit may take quite sometime since the courts are now focussing on pre-2000 cases and, in the interim period, the said works would stall and the building would be another 'eye sore' for Kuala Lumpur dwellers to tolerate;

(3) the plaintiff will be liable to pay millions of ringgit in LAD to the proprietor who in turn will have to pay the purchasers millions of ringgit in LAD;

(4) the said works will be regarded as abandoned;

(5) the purchasers may rescind the sale and purchase agreements and may even demand the refund of the deposits and whatever monies that have been paid and failing which the plaintiff may be wound up for its inability to pay and this would cause a chain reaction that may even affect the proprietor;

(6) all projects undertaken by the plaintiff and the proprietor (said to be a foreign investor) would be affected and, consequently, the purchasers numbering 1,000 odd may not be able to get their units;

(7) the defendant would continue with the said works and the defendant would not be able to complete the said works even on the extended period of completion on 10 July 2005;

(8) how could the defendant continue with the said works because its employment had been determined by the plaintiff in accordance with the PAM contract;

(9) the defendant has expressly and impliedly accepted the determination of their employment by their conduct of removing their goods and materials from the site;

(10) the defendant was only concerned about being paid for the work done by them and that was the reason why the defendant remained on the site;

(11) the defendant's continued occupation of the site has harmed and would cause irreparable harm if the defendant is allowed to occupy the site without carrying out any work; it would be reasonable to return possession of the site to the plaintiff who could immediately employ another contractor to carry out and complete the unfinished works;

(12) the plaintiff has a contractual obligation with the proprietor to hand over the duly completed building on or before 12 May 2005 (the plaintiff granted an extension of the completion date to the defendant to 10 July 2005 and this was done by the plaintiff magnanimously);

(13) the failure to deliver vacant possession to the purchasers would result in the proprietor having to pay damages for late delivery;

(14) the harm that the defendant suffers or may suffer is insignificant compared to the harm which the plaintiff suffers if the defendant continues holding onto the site; and

(15) the quantification of damages, which are in dispute, can only be decided at the trial stage and that would be a long way from today.

[58] On the other end of the scale, the defendant argued that if the injunctions sought for in encl 4 were granted, the plaintiff would have to appoint fresh sub-contractors to perform the exact same work which the defendant was contracted to do. And that it would certainly be impossible for the new set of contractors to be in a position to conclude the work by 10 July 2005 much less on 12 May 2005. It was argued that to appoint new sub-contractors would further delay the matter and would prevent the defendant from fulfilling their contractual obligations. It was argued that the present impasse on site further contributed to the delay. It was submitted that the defendant was working on the site till the plaintiff interfered with its possession and work. According to the defendant, all the plaintiff has to do would be to allow the defendant to complete the said works instead of terminating the letter of acceptance prematurely.

[59] I have considered the submissions of counsel on both sides and I must say that, on the facts, the defendant had breached cl 25.1 (i) of the PAM contract by stopping work, delayed the completion of the said works and failed to adhere to the work programme. All these motivated the plaintiff to determine the defendant's employment. If the defendant was allowed to remain in possession of the site as they wanted this court to allow them to do so, it would, with respect, result in a stalemate and finally an ultimate abandonment of the project. Another 'eye sore', so to speak, in the sky of Kuala Lumpur.

[60] The defendant here was just like the defendant in *Kong Wah Housing Development Sdn Bhd v Desplan Construction Trading Sdn Bhd* [1991] 3 MLJ 269 who was said to be 'abnormally slow' — a description by the architect when the latter wrote to the defendant. In that case, Abdul Malek Ahmad J (now the President of the Court of Appeal) in exercising his Lordship's discretion dismissed the defendant's applications to strike out the action and to set aside the injunction and his Lordship then stayed the proceedings pending arbitration. At pp 271 to 272 of the report, his Lordship succinctly said:

> As my view was that the owner could not be compelled to re-employ a slow contractor who has his own remedy in damages and that it is virtually impossible for the court to supervise such a building contract, my opinion was that the injunction should be sustained. I was therefore in full agreement with what Mahon J stated in *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309, namely:
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> > The proposed implication of a term in a contract, in particular a commercial contract, calls for careful consideration. A court is not entitled to reconstruct an agreement on equitable principles, or on a view on what the parties should have contemplated. The implication of the unexpressed term must be necessary to give to the transaction such business efficacy as the parties must have intended … With these observations in mind, what would be the presumed common intention of the parties to an ordinary building contract in the event of the development between them of a dispute amounting to an impasse relating to the construction of the works? The consequences of the impasse have to be considered. The works have been part completed, and the owner claims to be entitled to determine the contract for reasons of faulty workmanship, deviation from plans, slow progress, or the like. The owner stops progress payments and instructs his architect not to certify for further work. In theory the contractor can complete the next section of the work and bring an action, with its consequential delays, for the progress payment due in respect of that work, raising default by the owner as an answer to the defence that there is no architect's certificate. But in practice, the delay involved would be insurmountable. The contractor would have to lay off his employees, or transfer them to another job. In the absence of progress payments he probably could not pay his sub-contractors. The architect's authority to cooperate in the construction would be withdrawn. Under these circumstances it seems impossible to say that the contractor can obtain any benefit by remaining on the job. He has a claim for unpaid work to date, and a claim for loss of profit on the whole of the contract, and instead of working on under difficulties, and suing for unpaid progress payments, he surely would take the alternative course of leaving the job and suing to enforce his claims, thus recovering by action, if not in default under the contract, the moneys to which he would have been entitled if the works had been completed by him pursuant to the contract. The contractor's only interest in the transaction is to complete the specified works at a profit to himself. The owner's interest is to secure completion in accordance with his plans and specifications. Each object will still be attained even if the owner, in breach of his contract, procures the dismissal of the contractor from the site and completes the specified works by contract with another builder. Judged from the standpoint of business efficacy, I can for myself

see no difficulty in implying a term between the builder and the owner that in the event of a complete breakdown in their contractual relationship, the builder will surrender the site and the works, leave the owner to complete as and when he will, and enforce by action his remedy against the owner for breach of the building contract.

Mahon J had also referred to p 712 of *Hudson's Building and Engineering Contracts* (10th Ed) which states:

No injunction will ordinarily be granted to restrain the exercise of the powers given by a forfeiture clause for the contractor can be amply compensated in damages if the forfeiture is wrongful, whereas if the contractor were allowed to continue the work, the court could not specifically enforce the contract, nor compel the due completion of his obligation.

[61] The balance of convenience or the justice of the case tilted in favour of the plaintiff and I allowed, for the reasons as adumbrated above, prayers (a), (b), (c), (d) and (f) of encl 4 in favour of the plaintiff. I too ordered that the plaintiff to give their undertaking as to damages in compliance with prayer (g) of encl 4.

Application allowed.

Reported by David D Mathew